United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1402

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74 - 1402

BARBARA WISDOM, ANNA TIRADO, AND JANE CROE, INDIVIDUALLY AND ON BEHALF OF THEIR UNBORN CHILDREN AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS - APPELLEES vs. NICHOLAS NORTON, COMMISSIONER OF WELFARE, STATE OF CONNECTICUT AND VINCENT B. CAPUANO, DIRECTOR OF ELIGIBILITY SERVICES OF THE CONNECTICUT STATE WELFARE DEPARTMENT DEFENDANTS - APPELLANTS	Appeal from the United States District Court for the District of Connecticut Honorable Robert F. Zampano, District Judge

BRIEF FOR PLAINTIFFS-APPELLEES

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ISSUE PRESENTED FOR REVIEW

Does the term "dependent child" as used in Section 406(a) of the Social Security Act include an unborn child, thereby entitling unborn children and their mothers to AFDC benefits?

STATEMENT OF THE CASE

Nature of the Case

Plaintiffs-Appellees (hereafter plaintiffs) Barbara Wisdom, Anna Tirado, Jane Croe and their unborn children filed this action on November 12, 1973, seeking declaratory and injunctive relief on behalf of themselves and all others similarly situated with regard to a Connecticut policy denying AFDC benefits to pregnant mothers and their unborn children, on the grounds that such a policy contradicts the Social Security Act and regulations issued pursuant thereto and also violates the Equal Protection Clause of the United States Constitution. (R. 1, Complaint). Defendants-Appellants (hereafter defendants) are the Commissioner of Welfare of the State of Connecticut and the Director of Eligibility Services for the Connecticut State Welfare Department.

Plaintiffs brought their complaint in two counts: Count One claimed that the Welfare Commissioner under color of the state law of Welfare Department policy deprived plaintiffs of their rights under the Equal Protection clause of the Fourteenth Amend-

ment to the United States Constitution by denying basic subsistence in the form of AFDC payments and medical care to unborn children and their mothers, but providing benefits to all other eligible children and their mothers. Plaintiffs claimed that such a classification bore no rational relation to the purposes of the AFDC program. (R. 1. (p.8), Complaint, para. 24). In Count Two plaintiffs claimed that as they were eligible under federal standards, the State policy was contrary to the intention of the Social Security Act and was therefore invalid under the Supremacy Clause of the Constitution of the United States. (R. 1 (p.10), Complaint, para. 29).

Course of Proceedings

On November 16, 1973 the United States District Court for the District of Connecticut entered a temporary restraining order, (R. 6, Motion), restraining defendants from refusing to provide AFDC benefits to the three named mothers and their unborn children pending a hearing on plaintiffs' motion for a preliminary injunction. (R. 13, Motion). A hearing was held on December 7, 1973, at which time the court consolidated the application for a preliminary injunction with the trial on the merits, pursuant to Rule 65 (a)(2), F.R.C.P. After considering the oral arguments and briefs of the parties (R. 15, Memorandum) and hearing the testimony of six witnesses, (Tr. 3-13, 28-30), Judge Zampano issued

a Memorandum of Decision on January 2, 1974. (R. 18, Decision). Following a hearing held February 21, 1974, Judge Zampano entered an Order dated February 21, 1974, Judge Zampano entered an Order dated February 21, 1974 (R. 24, Order) and stayed its enforcement by order filed March 6, 1974 pending decision on defendants' appeal. (R. 23, Order). On March 13, 1974 defendants filed an Amended Notice of Appeal. (R. 27)

Disposition Below

The District Court entered judgment for the plaintiffs, holding that unborn children are eligible for assistance under federal standards. (R. 18, Decision). The Court found that "(t)he definition of 'child' includes a 'fetus', and 'unborn human being', and an 'unborn infant'", and that "the medical evidence clearly indicated that inclusion of the unborn child as a 'dependent child' is consistent with the purposes of the Act". The court found that "no credible argument" can be advanced that Congress intended to exclude the unborn from coverage, and noted the unsuccessful attempt by the 92nd Congress to amend the Act to exclude unborn children. The court also considered the HEW regulations permitting payments to the unborn, but pointed out that the optional features of these regulations violate the Social Security Act. The court concluded that "in the absence of express Congressional authorization, a State policy that excludes persons

eligible for assistance under federal standards is in conflict with the Act and is invalid under the Supremacy Clause". Invalidating the policy on these grounds, the Court did not reach plaintiffs' constitutional claims.

In its Order dated February 21, 1974 the court accordingly enjoined defendants from "failing to furnish AFDC and Medical Assistance to pregnant mothers and their unborn children who meet all of the eligibility conditions for AFDC save the invalid Connecticut requirement limiting AFDC to children who are born." (R. 24, Order).

Statement of Facts

As of the date this action was filed, the three named plaintiffs had each requested and been denied AFDC benefits pursuant to a policy of the Connecticut State Welfare Department that a child is not eligible until it is born. Each pregnant mother met all other eligibility requirements for AFDC and would have been granted assistance if her child had been born.

Plaintiff Anna Tirado was approximately three months pregnant on the date this action was filed. She was eighteen years old and was separated from her husband, the father of her unborn child, who did not provide any support whatsoever; until the month of October, 1973, Ms. Tirado received AFDC benefits for herself and her two born children.

On or about October 4, 1973, Ms. Tirado's estranged husband forcibly removed her children from her and took them to Puerto Rico. On October 11, 1973, she was informed by an agent of defendants that she was no longer eligible for AFDC because the children were not living with her;Ms. Tirado was also told that her pregnancy did not constitute a basis for AFDC eligibility. On the date of filing, Ms. Tirado was entirely without funds, and was dependent upon friends and relatives, themselves AFDC recipients, for the support of herself and her unborn child.

Plaintiff Jane Croe was seven months pregnant when this action was filed. She was twenty years old and unmarried, and the father of her unborn child was wholly and continuously absent. She was unemployed, and without income other than a General Assistance grant of $11.70 per week for all her expenses, plus a monthly voucher for part of her rent. In or around July, 1973, she was discouraged from applying for AFDC by her New Haven City Welfare Department social worker, on the basis of defendants' well-known policy. On October 17, 1973, she made application for AFDC benefits, which were denied on November 6, 1973.

Plaintiff Barbara Wisdom was approximately eight months pregnant with her third child when this action was filed. She separated from her husband, the father of her unborn child. On August 1, 1973 she applied for AFDC benefits for her family; she was informed that her two born children would be eligible,

but that no assistance would be granted to her unborn child. On October 10, 1973, she began receiving AFDC benefits for a family of three. (R. 4, Affidavits of Plaintiffs attached to Motion).

ARGUMENT

SUMMARY OF ARGUMENT

The principal issue in this case is whether an unborn child is a "dependent child" within the meaning of Section 406(a) of the Social Security Act, therefore entitling the child and its mother to be furnished AFDC benefits. The commonly accepted definition of child includes an unborn child, and in the absence of any indication to the contrary, it must be assumed that Congress intended the usual meaning of the word. In addition, for over thirty years, the administrative interpretation of the word child has included an unborn child. Providing for the needs of unborn children and their mothers also furthers the purposes of the Act. Indeed, a decision excluding unborn children from coverage would substantially undermine the goals of the AFDC program.

Applying the test enunciated by the Supreme Court in King, Townsend, and Remillard, an unborn child is eligible for AFDC according to federal standards. There is a total absence of any evidence in the Social Security Act or its legislative history permitting the State to vary the federal standard by excluding unborn children from benefits and HEW has no power to authorize such a deviation. Therefore, the State policy excluding the unborn conflicts with the Social Security Act and thus violates the Supremacy Clause.

This was the holding of the Court below, in which thirteen other Courts have concurred. Wisdom v. Norton, Civ. No. 15,906 (D. Conn., Jan 3, 1974). Accord, Alcala v. Burns, _____F. 2d_____(8th Cir., Mar. 29, 1974), aff'g 362 F. Supp. 180 (S. D. Iowa 1973) (A copy of which is included as Supplement "1" to Appellees' Brief); Doe v. Lukhard, _____ F. 2d_____(4th Cir., Feb 26, 1974), aff'g 363 F. Supp. 823 (E.D. Va. 1973), (A copy of which is included as Supplement "2" to Appellees' Brief); Stuart v. Canary, No. C 72-452 (N.D. Ohio, Dec. 27, 1973); Whitfield v. Minter, 368 F. Supp. 798 (D. Mass. 1973); Carver v. Hooker, Civ. No. 73-87 (D. N.H., Nov. 30, 1973); Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Texas, Nov. 14, 1973) (preliminary injunction granted pending decision of Parks v. Harden by the Fifth Circuit); Tillman v. Endsley, No. 73-1476-Civ-CF (S.D. Fla., Oct. 1, 1973): Jones v. Graham, Civ. No. 73-L-235 (D. Neb., Sept. 5, 1973): Green v. Stanton, 364 F. Supp. 123 (N.D. Ind. 1973); Harris v. Mississippi State Dept. of Public Welfare, 363 F. Supp. 1293 (N.D. Miss. 1973); Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1972). Contra, Mixon v. Keller, No. 74-111-Civ.J-T(M.D. Fla,, March 1, 1974); Poole v. Endsley, No. 74-22 (N.D. Fla., March 4, 1974); Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973): Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).

In response to the other issues which have been raised on appeal, appellees contend that they have standing to sue and that the District Court had jurisdiction to entertain the action. Appellees further submit that the order of the Court below was proper and that no issue as to level of benefits is raised by this case.

I.

PLAINTIFFS, MOTHERS AND THEIR UNBORN CHILDREN, HAD STANDING TO BRING THIS SUIT AND THE COURT HAD JURISDICTION TO CONSIDER IT.

A. The decision of the Supreme Court in Roe v. Wade does not deprive the plaintiffs of standing to sue.

Appellants contend that the decision in Roe v. Wade, 410 U.S. 113 (1973) deprives the plaintiffs-appellees of standing to sue. (Appellants' Br. 10-11). The rejection of this argument by the court below was correct because the decision in the abortion case is irrelevant to the plaintiffs assertion of a statutory claim to AFDC benefits and does not foreclose their equal protection claim.

1. Mothers and their unborn children have standing to assert a statutory claim to AFDC benefits.

The plaintiffs in this class action are "those women who have been medically determined to be pregnant and their (unborn) children, who meet all the eligibility requirements for AFDC, but are unreasonably denied AFDC benefits until the actual birth of the child." (R. 1 (p. 4), Complaint) (Emphasis supplied). This definition of the plaintiff class is substantially identical to the classes certified in other "unborn child" cases which include both mothers and their unborn children. See, e.g., Doe v. Lukhard, supra; Green v. Stanton, supra. In those cases, as in this one, certification of the class signified the Court's determination that the plaintiff mothers and their children had standing to sue.

The District Court decided in favor of the class on grounds that the state policy denying them benefits conflicted with federal law and thus was invalid under the Supremacy Clause. (R. 18, Decision). In doing so, the Court in effect rejected the State's argument as to standing, at least with respect to the statutory claim. Other courts have expressly reached the same conclusion. The court in Tillman v. Endsley ruled that:

> The named plaintiff and her unborn child have standing to maintain this action because it is alleged that the defendant has denied rights and benefits granted to the plaintiff mother and her unborn child by an Act of Congress. Because the plaintiff mother and her unborn child have standing under the statutory claim, it is not necessary at this time to determine the question of an unborn child's standing to assert the Fourteenth Amendment claim in light of Roe v. Wade, 410 U.S. 113 (1973),

Tillman v. Endsley, supra, slip. opin. at 2. Acc., Alcala v. Burns, supra, 362 F.Supp. at 182.

Contrary to the State's contention, plaintiff mothers clearly have rights to payments under the AFDC program. In the early days of the AFDC program payments were made for the child's needs only. (Appellants' Br. at 11, citing Parks v. Harden, supra at 624, n. 4). However, in 1950, Congress recognized that realistically the needs of the dependent child could not be met without taking into account the needs of the caretaker relative, who in most instances is the mother. This observation is peculiarly

applicable to the circumstances of the unborn child. In that year, Congress accordingly amended 42 U.S.C. §606 (b) to allow coverage for the needs of the caretaker relative; federal medical benefits are also available to the mother as well as her children.* Since then, numerous decisions have recognized that the caretaker relative may assert his or her own rights to AFDC benefits under the Social Security Act. See e.g., Lopez v. Vowell, 471 F.2nd 690 (5th Cir., 1973), cert. den., ___U.S.___ 93 S.Ct. 1903 (1973); Rodriquez v. Vowell, 472 F.2nd 622 (5th Cir., 1973) cert. den. ___U.S.___, 93 S.Ct. 2777 (1973); Triplett v. Cobb, 331 F.Supp 652 (N.D. Miss., 1971) (medical benefits).

2. Mothers have standing to assert a constitutional claim on behalf of themselves and their unborn children.

Since both mother and child have standing to claim that the State is depriving them of their statutory entitlements contrary to federal law, and this case was decided upon the statutory claim, as one court has held, Roe v. Wade is "not relevant" here. Alcala v. Burns, supra, at 186. Nevertheless, an analysis of Roe indicates that mothers can assert a claim to AFDC assistance under the equal protection clause on behalf of themselves and their unborn children.

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*Those eligible for AFDC are automatically eligible for medical assistance under Title XIX of the Social Security Act 45 C.F.R. §206.10 (a) (1).

The thrust of the Supreme Court's opinion there was that the State had a legitimate interest in preserving and protecting the health of the pregnant woman, and also in protecting the potentiality of human life. In the abortion situation, these interests sometimes conflict, and the Court was called upon to balance them. That a balancing of interests did take place is indicated by the decision to permit the woman greater freedom of choice to terminate a pregnancy in the earlier months, but permit increasing State regulation in the interests of preserving life as the potentiality for it increases in the later months of the term.

In the instant case, however, the interests of the mother and her unborn child will always coincide and indeed are inseparable. Each expectant mother who is a member of the plaintiff class wishes to bear her child. The interest in preserving the mother's life and health, as well as her freedom of choice--in this case, to have a child - - and the interest in the unborn child's life and health, are both served by receipt of AFDC benefits. Roe does not prohibit such mothers from asserting the constitutional rights of themselves and their unborn children to AFDC benefits in the interests of their common health and well-being.

B. The District Court had jurisdiction to consider this case.

The rule is well-established that given the existence of a sufficiently substantial constitutional claim, a District Court has pendent jurisdiction over a claim of conflict between state and federal law. Rosado v. Wyman, 397 U.S. 397, 402-405 (1970). Recently, in reviewing the substantiality of a constitutional claim the Supreme Court reasserted the test of what is "sufficient to confer jurisdiction on the District Court to pass on the controversy." Hagans vs. Lavine, ___U.S.___, 42 U.S.L.W. 4381, 4385 (March 25, 1974). In Hagans, the Court held that unless a constitutional claim is foreclosed by prior Supreme Court decisions or is patently insubstantial on its face, federal jurisdiction is conferred, whatever might be the ultimate resolution of the issue on the merits. 42 U.S.L.W. at 4386.

Plaintiffs in Hagans, recipients of AFDC and their children, challenged a New York regulation permitting the State to recoup prior unscheduled payments for rent from subsequent AFDC grants. They claimed that in recouping the emergency rent payments from future welfare disbursements, the state deprived some needy children of benefits because of parental default in violation of the Equal Protection Clause. They also alleged that because the regulation assumed, contrary to fact, that funds extended to a recipient to satisfy a current emergency rent-need remain available for the family's use for a six-month recoupment period,

resulting in a denial of assistance to otherwise eligible individuals, the state policy conflicted with Social Security Act provisions 42 U.S.C. §602 (a) (7) and (a) (10) and HEW regulations.

The District Court found that plaintiffs had presented a sufficient equal protection claim to provide a basis for pendent jurisdiction and determined the so-called "statutory" claim in plaintiffs' favor.* ___F.Supp.___(E.D.N.Y., 1972). The Court of Appeals disagreed that plaintiffs' constitutional claim was "substantial" and held that the District Court therefore lacked jurisdiction to entertain the statutory claim. Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973). In reversing, the Supreme Court held that for jurisdictional purposes, a court's inquiry into the substantiality of a constitutional claim is limited to ascertaining whether the claim is

> "so insubstantial, implausible, foreclosed by prior decisions of this court or otherwise completely devoid of merit as not to involve a federal controversy."

42 U.S.L.W. at 4386.

Applying the standard to the situation in Hagans, the Court found that none of its previous cases specifically dealt

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*The Supreme Court noted that the argument for the exercise of pendent jurisdiction was "particularly strong", because the pendent claim, "although denominated 'statutory', is in reality a constitutional claim arising under the Supremacy Clause." Hagans, at 4388.

with the particular regulation in issue or any similar one, bringing the issue within the realm of controversy.* In addition, it was not "immediately obvious" to the Court from the face of the complaint that the state policy "was so patently rational as to require no meaningful consideration." Hagans at 4385. Although the Court of Appeals' reasoning on the rationality of the regulation might ultimately prove correct, the Court found that it was not a proper basis for a dismissal for want of jurisdiction.

Applying the Hagans test to the instant case, the constitutional claim asserted by plaintiff mothers and their unborn children is sufficient to confer jurisdiction on the District Court. Doe v. Lukhard, supra, slip. opin. at 5-6; Alcala v. Burns, supra, slip. opin. at 3. Plaintiffs alleged that by denying the eligibility of mothers and their unborn children until the actual birth of the child, Connecticut deprived some needy children and mothers of AFDC benefits in violation of the Equal Protection Clause. (R. 1 (p.8), Complaint). As in Hagans, the District Court found this allegation sufficient to allow it to consider plaintiffs' other claim that the state's policy also resulted in a denial of aid to otherwise eligible individuals contrary to

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*The Court noted that those District Courts which had ruled on similarly drafted state recoupment provisions had determined they were not rationally related to the declared purposes of the AFDC program and were therefore invalid under the Social Security Act and HEW regulations. Hagans at 4385, n.6.

statutory provisions 42 U.S.C. §602 (a) (10) and §606 (a) and HEW regulations. Acc., Whitfield v. Minter, supra, slip. opin at 4-5.

No previous Supreme Court decisions have specifically dealt with the issue raised here, the eligibility of unborn children for AFDC benefits. There is clearly "room for the inference that the question sought to be raised can be the subject of controversy." (Citations omitted). Hagans, at 4384, as the 15 lower court decisions in similar cases demonstrate. Even where plaintiffs have ultimately not prevailed, the courts have recognized that the equal protection claim was "not insubstantial for the purpose of jurisdiction." Murrow v. Clifford, supra, slip. opin. at 1-2. A "colorable claim of denial of equal protection" having been alleged, the District Court properly exercised its pendent jurisdiction to consider the Supremacy Clause claim. Alcala v. Burns, supra, slip. opin. at 3.

II

CONNECTICUT POLICY DENYING AFDC BENEFITS TO MOTHERS AND THEIR UNBORN CHILDREN ELIGIBLE FOR ASSISTANCE UNDER FEDERAL STANDARDS VIOLATES THE SUPREMACY CLAUSE.

A. Eligibility for AFDC is determined by federal standards.

Congress established Title IV of the Social Security Act of 1935, 42 U.S.C. Sec. 601 et seq., the Aid to Families with Dependent Children (AFDC) program, as a federal grant-in-aid program to deal with the fundamental needs of economically deprived and dependent children. For eligibility purposes, the most important provision of the Act is Section 406(a), 42 U.S.C. §606(a), which defines the term "dependent child". (The full text of §406(a) is included as Supplement " 3 " to Appellees' Brief.) The above section must be read in conjunction with §402(a)(10) of the Act which requires that aid be furnished to "all eligible individuals." (emphasis supplied). Addressing the inter-relationship of these provisions in several cases, the Supreme Court has established unequivocally that eligibility must be measured by federal standards, and that all whom Congress intended to be eligible for AFDC under federal law are entitled to such assistance and may not be excluded by participating States, absent express Congressional authorization for the exclusion. King v. Smith, supra; Townsend v. Swank, Carleson v. Remillard, supra.

In King v. Smith, supra, a man who lived with the mother was defined by Alabama as a "parent" and AFDC benefits were denied to needy children because no "parent" was "continually absent from the home," as required under Section 406(a), 42 U.S.C. Sec. 606(a). After examining the Social Security Act and its purpose, the Court concluded that Congress must have intended the word "parent" to encompass only one who was legally obligated to support the dependent child. In defining "parent" in a manner inconsistent with the federal standard, Alabama was found to have denied aid to children eligible under federal law, contrary to Sec. 402(a)(10), and the state's policy was struck down.

In Townsend v. Swank, supra, the Court considered the validity of Illinois policy which defined AFDC-eligible children to include eighteen to twenty-year-old high school and vocational school students, but not children of the same age attending college, whereas the Social Security Act, 42 U.S.C. Sec. 606(a)(B) expressly included such children in the definition of "dependent child". Rejecting the position of the state and HEW(as amicus curiae) that eligibility for children attending college should be presumed to be optional with the State absent a specific statutory mandate to the contrary, the Court enunciated the controlling test. In cases of AFDC eligibility:

> "King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."

404 U.S. at 286 (emphasis supplied). Applying the test, the Court found no such evidence and held that the State was precluded under Sec. 402(a)(10) from denying aid to those children entitled to benefits under the federal law.

A unanimous Court in Carleson v. Remillard, supra, reiterated the holding of King and Townsend with respect to federal eligibility criteria. In that case, plaintiffs, wives and children of servicemen, challenged the validity of a California regulation which excluded absence because of military service from the definition of "continued absence" under §406(a) of the Social Security Act, so as to deny AFDC benefits to children whose fathers were away from home because of military duty. In determining the federal standard, the Court found that the words "continued absence" accurately described a parent on active military duty and found no authority in the Act suggesting the term was an "accordian-like concept", applicable to some parents, but not to others. Remillard, supra, at 602. The Court noted that the HEW matching regulation permitted payments where parental absence was due to military service and that such a position was

consistent with the legislative history and in furtherance of the purposes of the Act. The Court concluded that since California's definition conflicted with the federal criterion by excluding without congressional authorization dependent children under the Act, the State regulation was invalid. Id, at 604.

Similarly, plaintiffs here have challenged the validity of the Connecticut regulation which excludes unborn children from the definition of "dependent child" under §406(a), denying AFDC benefits to mothers and their children who are not yet born. Plaintiffs also claim the words of the statute accurately describe them and there is no authority in the Act for a more restrictive interpretation. Plaintiffs further alleged that as in Remillard, the HEW matching regulation provides for matching funds on their behalf and that this regulation is wholly consistent with the history and purposes of the Act. Therefore, the eligibility of plaintiffs must be determined according to federal standards as set forth in King, Townsend and Remillard, supra. (R. 18 (p.5), Decision) Acc., Alcala v. Burns; Doe v. Lukhard; Stuart v. Canary; Whitfield v. Minter; Carver v. Hooker; Tapia v. Vowell; Tillman v. Endsley; Jones v. Graham; Green v. Stanton; Harris v. Mississippi; Wilson v. Weaver; supra.

B. Unborn children are eligible for AFDC under Federal standards.

The word "child" as used in 42 U.S.C. §602(a) encompasses an unborn child. The ordinary meaning of the word "child", as well as the long-standing administrative interpretation of the term "dependent child" clearly establishes the eligibility of unborn children under the Social Security Act. Moreover, "any uncertainty about the meaning of the word child should be resolved in light of the broad remedial goals of the AFDC program...." Wilson v. Weaver, supra at 1154.

1. The ordinary meaning of "child" includes an unborn child.

The State does not dispute that an accepted definition of "child" is "the unborn or newly born human being; foetus, infant." This is the first definition of "child" in The Oxford English Dictionary, (1933); it should be noted that this dictionary was published only two years before Congress enacted the Social Security Act, and thus suggests the usual meaning of the word to those drafting the legislation. Other major dictionaries give similar definitions. Webster's New Twentieth Century Dictionary (Unabridged), 313 (2nd Ed. (1970); Webster's Unabridged Dictionary, 465 (2nd Ed. 1969); The American Heritage Dictionary of the English Language, 233 (1969); The World Book Dictionary, 338 (1967). None on these dictionaries note that the definition

is archaic or obsolete. The everyday usage of the word "child" also reflects the common understanding that it includes the unborn. The word "fetus", on the other hand, is rarely heard in ordinary conversation; rather, a pregnant woman is said to be "with child", and her unborn baby is the "child she is carrying". Thus, the word "child" "accurately describes" an unborn child. Remillard, supra at 602.

2. Nothing in the act indicates that "child" does not include an unborn child.

Appellants assert that the word "child" is used in other Sections of Title IV in a way that clearly refers to born children (Appellants' Brief at 6). However, it is an accepted maxim of statutory construction that where identical words are used in a statute with quite different meanings, it is the duty of the Courts to give the words different meanings. Grand Lodge of International Ass'n of Machinists v. King, 335 F. 2d 340 (9th Cir. 1964), cert. denied, 379 U.S. 920; Atlantic Cleaners & Dyers v. U.S., U.S. 427, 433 (1932). The necessity for such a rule is obvious, since a statute must cover a multiplicity of different situations. To impose an artificial rigidity on words used in the statute would be to distort its meaning and frustrate the intent of those who drafted it.

Thus, the fact that Congress spoke of born children in the now emasculated residency provisions of 42 U.S.C. §602(b) does not mean that the word "child" wherever used necessarily refers

to a born child. And, in providing for determining the paternity of illegitimate children (42 U.S.C. §602(a)(17)(A)(1), cited by Appellants at p. 6 of their Brief), Congress had no choice but to restrict its language to children "born out of wedlock", since by definition children are illegitimate only after birth.* It could not seriously be suggested that this section restricts the Act to illegitimate children or that the reference in 42 U.S.C. §602(a)(7) to "earned income of a dependent child" serves to restrict the coverage of the Act to children who earn income, yet that is the logical extension of what the State appears to be suggesting here. Moreover, 42 U.S.C. §602(a)(17)(A), was adopted as part of the 1968 Amendments to the Social Security Act, long after the word "child" had been interpreted by HEW as encompassing the unborn child (See Section 3, infra), Had Congress intended to reverse this long-standing interpretation, presumably it would have amended §406(a) at that time.

Although appellants have stated the "only real issue" in this action is how Congress meant to define the word "child" in 42 U.S.C. §606(a), they refer to other words in the Social Security Act, in an attempt to bolster their argument. (Appellants' Brief. at 2).

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*The American Heritage Dictionary, at 656 defines illegitimate as "born out of wedlock". And see, §52-438a, Conn. Gen. Stat. providing that the final trial in a paternity proceeding instituted by an expectant mother shall not be had until after the birth of the child. (A copy of which is included in Supplement "4" to Appellees Brief).

Thus the State asserts that the word "mother" refers only to a woman who has borne a child. (Appellants' Br. at 5). However, Black's Law Dictionary (4th Revised Edition) specifically states that "[t]he term [mother] includes maternity during the prebirth period", while Bouvier's Law Dictionary defines "en ventre sa mere" as "in its mother's womb" (emphasis added). Indeed, Connecticut law provides that an "expectant mother" may institute proceedings to establish the paternity of a child born or conceived out of lawful wedlock "prior to the birth of the child". §52-435(a), Conn. Gen. Stat. (Included in Supplement "A").

Appellants also argue that a pregnant woman and her unborn child cannot be considered a "family" and therefore Congress must not have intended to include them in the Aid to Families with Dependent Children program (Appellants' Br. at 6). As discussed above, the common usage recognizes the pregnant woman and her unborn baby as "mother" and "child" - a family as that term is ordinarily understood. Moreover, until 1962, the name of the AFDC program was "Aid to Dependent Children"; the change to "Aid and Services to Needy Families with Children" reflected Congress' concern for the needy caretaker relatives of eligible children who for the past decade had been receiving assistance under the AFDC program. Part of the 1962 Amendments entitled "Technical amendments to Reflect Emphasis on Rehabilitation and other Services", (S. Rep. 1589, 87th Cong., 2d Sess., as printed in 1 U.S. Code Cong. and Admin. News 1943, 1968 (1962), the change in title

certainly cannot be said to have superimposed upon §406(a) a new and more restrictive eligibility requirement.

It should be also noted in this regard that if a family is defined in terms of individuals living together, surely an unborn child is "living" within its mother's womb: Black's Law Dictionary (4th Revised Edition) defines "living" as "existing surviving or continuing in operation...A child in the mother's womb is living." In S.S.R. 73-19 (May, 1973) (a copy of which is included as Supplement "5" to Appellees Brief), the Social Security Administration ruled that father was "living with" his unborn child by virtue of his living with the pregnant mother, thereby entitling the child to retirement insurance benefits. If this child was "living with" his or her father, there can be no question that the child was also living with the mother.*

Accepted rules of statutory construction require that courts attribute to the words of a statute their ordinary meaning, Banks v. Chicago Grain Trimmers Ass'n., 390 U.S. 929. As demonstrated above the ordinary meaning of the word "child" does include the unborn child and there is nothing in Sec. 606(a) to indicate

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*Economy v. Gardner, 286 F.Supp. 472 (W.D. Tex. 1967), aff'd per cur. 396 F. 2d 115 (5th Cir. 1968), cited by Appellants at p.7 of their Brief, has no relevance to the receipt of AFDC benefits by unborn children. Rather, the issue involved in that case was whether a statutory amendment suspended the requirements that in order to claim benefits for his adopted niece and OASDI recipient must have supported her and lived with her during the period when he established his own eligibility and applied for benefits. The Court ruled that the amendment did not suspend the application of the rule to the plaintiff, and since the child was not even born until five years after the claimant's eligibility was established, he was not entitled to benefits for the child.

that the word should have anything other than its usual definition. Thus, the Court below was correctly persuaded that the word "child" was used by Congress "advisedly, and that the Congressional intent was to give the word its usual and commonly understood meaning." Harris v. Mississippi, supra, at 1297.

3. HEW regulations define an unborn child as a "child" for purposes of §602(a).

To ascertain the federal standard with respect to the AFDC eligibility of the unborn child, it is proper to give great weight to the interpretation of the Act made by the federal agency charged with its administration. Lewis v. Martin, 397 U.S. 552, 567 (1970). In this case, the long-standing and consistent administrative interpretation of "dependent child" as used in Section 406(a) that unborn children are included in the term "dependent child".

The origins of this interpretation date from at least 1941, when the Social Security Board over-ruled an audit exception to Wisconsin's payment of benefits to unborn children, and directed that such exceptions were not to be made in the future. The Board articulated the principal reasons in support of its ruling that payments to unborn children were authorized under the Act: (1) AFDC program was designed to meet the needs of children deprived of parental support or care in any of the circumstances in which they arise, including the child's prenatal existence; (2) since the circumstances of the prenatal period affect the child's later development, the needs during this period should be met to ensure sound and health development; and (3) "the needs of the child are met only as the mother's

needs, economic, social, and medical, are adequately cared for throughout the period of pregnancy. See, Transmittal Sheet for Board Action and Memorandum, dated May 10, 1941. (Copies of the documents are included as Supplement "6" to Appellees Brief).

This policy was subsequently formalized in Sec. 3412, para.6, of the Handbook of Public Assistance Administration, which authorized payments on behalf of the unborn child "on the basis of the same eligibility conditions as apply to other children". (Copy included as Supplement "7"). This paragraph appears under the general Sec. 3410 headed "Deprivation of Parental Support or Care," with the statutory authority stated to be §406(a); clearly this was intended to be an administrative interpretation of the meaning of "dependent child" as used in that section of the Act.

In 1965 HEW reaffirmed its position that AFDC for the unborn was covered under Section 406(a) of the Act, and was consistent with the objectives of the Act. In that year, HEW reviewed a State provision which provided assistance to an unborn child of a mother receiving AFDC for other born children, but excluded the unborn child of a pregnant mother with no other children, the situation of the named plaintiffs, Ana Tirado and Jane Croe. The State plan provision was ruled to be contrary to Title IV of the Act in that it arbitrarily and capriciously discriminated against the unborn child without siblings and was therefore unreasonable in terms of the objectives and principles governing administration of the AFDC program. HEW, Policy Information Release No. 37(Feb. 4, 1965). (Copy included as Supplement "8" to Appellees' Brief).

Finally, the present regulations first state that the phase "needy child" in §406(a) "encompasses the situation of any child..." 45 C.F.R. §233.90(c)(1)(i), and then expressly provide for federal financial participation in payments "with respect to an unborn child", 45 C.F.R. §233.90(c)(2)(ii). The regulation also provides for federal participation in "expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the ... pregnancy of a mother", further confirming the AFDC eligibility of mothers and unborn children under federal standards. 45 C.F.R. §233.90(c)(3).

Thus, for over thirty years the agency charged with the administration of the Social Security Act has consistently interpreted the word "child" as used in §406(a) to include the unborn child. With the passage of time the administrative interpretation assumes the status of an expression of legislative intent "through Congress having let the administrative interpretation remain undisturbed for so many years." United States v. Leslie Salt, 350 U.S. 383, 397 (1956). In the instant case, then, "acquiescence by Congress in an administrative practice may be an inference from silence during a period of years, and that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons." Norwegian Nitrogen Products v. U.S., 288 U.S. 294, 311 (1933).

This principle has even greater applicability here, where specific legislation intended to reverse the administrative interpretation failed of passage. In the 92nd Congress, it was fully recognized that Section 406(a) had been interpreted to include the unborn child

within the definition of "child". Wilson v. Weaver, supra at 1155, n. 4. Each House proposed revisions of §406(a) that would have limited payments to born children; however, the proposals were eliminated by the Conference Committee and the program left unchanged.

As the Court pointed out in Wilson, supra, if in 1972 Congress had not thought that unborn children were included in the definition of "child", such legislative amendment of §606(a) would have been unnecessary; instead, Congress could merely have instructed HEW that inclusion, of unborn children in the AFDC program was unauthorized under the Social Security Act. It is the well settled rule that:

> [T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 381 (1969). By not passing the proposed amendment, Congress left unchanged the prevailing federal eligibility standard which includes the unborn.

4. Inclusion of the unborn within the definition of "dependent child" furthers the purposes of the Social Security Act.

The intent of Congress in enacting the Social Security Act is furthered by including unborn children within the Act's coverage;

failure to do so actually undermines the primary purposes of the AFDC program. For, as the Supreme Court noted in King v. Smith, supra, the protection of dependent children "is the paramount goal of AFDC." 392 U.S. at 325. This goal would be frustrated if the Act were interpreted as providing for assistance to needy children only after the most critical period of their development had passed.

The Court in Stuart v. Canary, supra, found the avowed purpose of the Social Security Act is to "help maintain and strengthen family life", 42 U.S.C. §601. Slip opin. at 5 The Court found that "the health, both mental and physical, of children is an integrial part of the stability and well-being of family life", and that the adequacy of prenatal nutrition has been demonstrated to be an important determinant of the health of the infant. The Court concluded:

> If adequate fetal nutrition can alleviate in any degree potential burdens upon the state toward the goal of familial bettrrment, inclusion of the unborn as eligible for AFDC coverage is indicated by the intent of Congress in implementing the Social Security Act.

Stuart v. Canary, supra, Slip opin. at 6.

As the District Court below held, "the medical evidence clearly indicated that inclusion of the unborn child as a "dependent child" is consistent with the purposes of the Act." (R. 18(p.4.),Decision). Proper prenatal nutrition and medical care are critically important to the life and health of both mother and child, and the effects of deprivation on the unborn child during

this crucial period, cannot be fully compensated for by treatment after birth. (Tr. at 3-10, 28-30). Having also expressed its concern over the extremely high maternal and infant mortality rates existing in the United States during the 1930's, Congress must be assumed to have intended to adopt a rational and effective program to deal with these problems. See Senate Committee Report, S. Rep. No. 628, 74th Cong., 1st Sess. 20 (1935); see also, House Committee Report, H.R. Rep. No. 615, 74th Cong.m 1st Sess. 12 (1935).

In response to these problems, Titles IV and V of the original Social Security Act were adopted. Act of Aug. 14, 1935, Ch. 531, 49 Stat. 627-34. Title V provided for maternal health services. Funds under Title V, however, are available only to health-care institutions, and do not provide any cash payments to needy individuals. Surely one cannot assume that the Congress which enacted a Social Security plan designed to be comprehensive would have stopped short of providing the financial aid to unborn children without which the health services would be an empty gesture.*

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*In an effort to establish that Congress intended to restrict AFDC coverage to born children, Appellants refer to the statement of Representative Ellenbogen, Congressional Record, Volume 79, Part 7, p. 7838, 74th Congress, 1st. Sess. (Appellants' Brief, p. 7.) This was a remark made by one member on the floor of the House, in the course of a general debate on social security legislation. The discussion was not addressed to Title IV, and this statement cannot reasonably be read as a pronouncement on the scope of that legislation.

A limiting interpretation is inconsistent with the subsequent development of the Social Security Act as well. Since 1935 the coverage and scope of those provisions within the Social Security Act relating to children have been greatly expanded, indicating an ever-increasing concern for the total well-being of all "children". (See partial chronological list of amendments included as Supplement "9" to Appellees' Brief.) This succession of amendments to the Act clearly indicates a consistent and continuing pattern of liberalization of benefits and eligibility standards since the original Act of August 14, 1935. Although to some extent a reflection of the concerns of the particular session of Congress involved, the pattern of amendments reflects a consistent evaluation, over some thirty-eight years, of the purpose of the original Act itself. The emphasis remains on obtaining effective delivery of financial and other forms of aid to dependent, needy children; far from restricting the scope of the original definition of "dependent child", this concept has been significantly broadened. Within this historical setting, a denial of Title IV benefits to unborn, dependent children would be a tragic and unjustified step backwards. It would create a period of limbo in the developing life of each needy dependent child during which the Social Security Act would remain uncharacteristically indifferent. Just as in Remillard, supra,

> we cannot assume here, anymore than we could in King v. Smith...,that while Congress 'intended to provide programs for the economic security and protection of all children', it also'intended arbitrarily to leave one class of destitute children entirely without meaningful protection.'

406 U.S. at 604 (citations omitted).

C. There is no Congressional authorization for states to exclude unborn children from AFDC eligibility.

Under the Supreme Court trilogy, once plaintiffs establish eligibility for AFDC under federal standards they cannot be excluded by the States absent "clearly evidenced" Congressional intent to authorize the exclusion. Such clear evidence can only come from the language of the Social Security Act or its legislative history. Townsend v. Swank, supra, at 286. Furthermore,

> "Under the trilogy rulings the burden is on the State to show that Congress evidenced an intent, either in the Statute or in legislative history, to allow States to vary the eligibility requirements in question".

Doe v. Lukhard, supra., 363 F.Supp. at 827.

The recent decision in New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) reaffirms the trilogy rule. Green v. Stanton, supra, at 127; Doe v. Lukhard, supra, 363 F.Supp. at 827, n.5. The Court held in Dublino that in enacting the provisions of the Social Security Act establishing the federal WIN program, Congress did not intend to pre-empt State work-incentive legislation which did not conflict with the Act. The Court found convincing evidence of congressional authorization for state work programs in the language

of the Act itself and in the legislative history. Furthermore, the existence of complementary state work programs was consistent with and in furtherance of the purposes of the WIN program. Dublino at 418-420.

The Court specifically distinguished the King, Townsend and Remillard decisions on these grounds. In the remainder of the paragraph from which appellants have quoted one sentence out of context, the Court stated that in those cases it had

> "found no room either in the Act's language or legislative history to warrant the State's additional eligibility requirements. Here, by contrast, the Act allows for complementary state work incentive programs and procedures incident thereto..."

Dublino, supra, at 422 (emphasis supplied). Remanding the case for a determination of whether any particular provisions of the New York work rules did in fact conflict with the WIN program, the Court reemphasized its holdings in King, Townsend, and Remillard that "if there is a conflict of substance as to eligibility provisions the federal law of course must control." Dublino at 423, n. 29.

Here, as in King, Townsend, and Remillard, and in contrast to Dublino there is a "conflict of substance" between a state exclusion and a federal eligibility provision. Green v. Stanton, supra, at 127. The State has produced no evidence of Congressional authorization for its departure from the federal standard. After

thorough consideration, the District Court concluded that "[N]o credible argument can be advanced..." that Congress intended to allow unborn children to be excluded from coverage under the Act. (R. 18(p.4), Decision). This conclusion has been reached by the majority of the courts which have considered the question of AFDC eligibility of unborn children. Finding no clear evidence in the language and history of the Act of Congressional intent to allow exclusion of unborn children, the Courts have followed the rule of the Supreme Court trilogy and invalidated the States' policy. Alcala v. Burns; Doe V. Lukhard; Stuart v. Canary; Whitfield v. Minter; Garver v. Hooker; Tapia v. Vowell; Tillman v. Endsley; Jones v. Graham; Green v. Stanton; Harris v. Mississippi; Wilson v. Weaver; supra.

Without such Congressional authorization, HEW has no more power than an individual state to vary an eligibility critria by allowing the exclusion of those who are eligible under the statute. Townsend, supra; Remillard, supra. The Court in Parks v. Harden, supra, which ruled against plaintiffs, found the legislative history inconclusive regarding Congressional intent with respect to the eligibility of the unborn child, but afforded great weight to the HEW position purporting to make eligibility for unborn children optional with the states. 354 F. Supp. at 625-626. But 42 U.S.C. §603 provides that the federal government may match payments made only to eligible individuals. The fallacy of the proposition that eligibility of unborn children is optional

was succinctly stated by the Doe v. Lukhard court:

> If HEW is asserting that unborn children are eligible but states may disregard eligibility, then that theory is proscribed by the Supreme Court trilogy and void. If HEW is asserting that unborn children are really not eligible but that payments will be made anyway, then that policy is violative of Sec. 603 of the Act.

363 F.Supp. at 829, n.8.

As Appellants correctly noted (Appellants' Br. at 10), if this Court were to hold that unborn children are not included within the meaning of Sec. 406(a), HEW would be prohibited from providing matching funds to any state covering unborn children since it is authorized to match funds only for payments to eligible individuals. A ruling adverse to the plaintiffs-appellees herein would effectively eliminate all payments to unborn children, even in the 19 states which had chosen to make such payments, and HEW's matching for the past thirty-two years will be deemed illegal.

However, while the Supreme Court has explicitly rejected the notions embodied in HEW regulations that states are free to chose whether they wish to adhere to federal standards, Townsend, supra at 286, it does not follow that "the Court must ignore" the HEW regulation. (Appellants' Br. at 10). Rather, the proper approach is that taken by the Court of Appeals for the Eighth Circuit in Alcala v. Burns, supra:

> We ask, as did the district court from whence can HEW have derived the authority to bestow benefits, upon unborn children if not from the eligibility provisions of the Social Security Act? We are inclined, in this respect, to accord substantial weight to HEW's understanding, implicit in the regulations, that unborn children are eligible. On the other hand, we are not permitted to defer to the agency's practice of making benefits to eligible persons optional.

Slip opin. at 6, citing Townsend, supra. The decision of the District Court in this case also rejected Appellants' argument, finding significance in the HEW regulations permitting payments to unborn children, but dismissing the "optional features" as "violative of the provisions of the Act." (R. 18(p.4) Decision). Acc., Tillman v. Endsley, supra.

III.

THE LEVEL OF BENEFITS PROVIDED BY THE STATE TO ELIGIBLE AFDC RECIPIENTS IS NOT AT ISSUE IN THIS CASE.

Having found the plaintiffs-appellees eligible for AFDC benefits under federal law, the District Court enjoined the State

> "...from failing to furnish AFDC and Medical Assistance to pregnant mothers and their unborn children who meet all of the eligibility conditions for AFDC save the invalid Connecticut requirement limiting AFDC to children who are born."

(R. 18, Decision, para. 2). The State claims that the order is improper because it is"not specific" and because plaintiffs presented no evidence of their expenses. (Appellants' Br. at 11-12). Both arguments that the order is "improper" are totally without merit.

The part of the injunction quoted above would be sufficiently explicit in and of itself to satisy the specificity requirements of F.R.C.P. 65 (d). Other courts which have ruled on this issue have phrased their relief in similar terms. See, e.g., Wilson v. Weaver, supra; Doe v. Lukhard, supra. Moreover, further paragraphs of the District Court's order detail the obligation of the State to furnish AFDC entitlements prospectively to members of the plaintiff class.* The state is directed to

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*The District Court specifically retained continuing jurisdiction with respect to retroactive relief, pending the decision, since rendered, in Edelman v. Jordan, ___U.S.___, 42 U.S.L.W. 4419 (March 26, 1974) (R.24, Order, para. 10)

provide the named plaintiffs the amount of AFDC benefits to which they are entitled from the date of the filing of the law suit forward. (R. 24, Order, para. 3) Accord, Green v. Stanton, supra; Tillman v. Endsley, supra. In paragraph 4, the State is ordered to pay pregnant women the AFDC benefits to which she and her child are entitled from the time of the judgment forward; paragraph 5 provides the same prospective relief for unborn children whose mothers were already AFDC recipients. (R. 24, Order, para. 4,5). The remaining provisions set out equally detailed instructions, making the order as a whole highly "specific."

The amount of actual benefits the State must provide under the order is determined by looking at Connecticut's state plan for participation in the AFDC program. Connecticut pays AFDC benefits to all eligible recipients according to a "flat grant" system. Connecticut State Welfare Department Manual, Vol. I, Secion 5000-5020, "Need Requirements and the Assistance Payment: Connecticut Family Assistance Plan - AFDC." Under this system, all assistance units of equal size receive the same amount of benefits regardless of the age of the members of the unit.* Thus, an assistance unit of two composed of a mother and a child one-day old receives $209.49, the same amount of benefits as an assistance unit composed of a mother and child 20-years-old. The order to furnish AFDC benefits to the members of the plaintiff

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*The amount of benefits Connecticut pays to all eligible families is currently in litigation. Johnson v. White, 353 F.Supp. 69, 75 (D. Conn. 1972) (rehearing pending).

class is, therefore, an order to pay the exact amounts the State has specified as the flat grant standard for the assistance unit of their number. Of course, if Connecticut so desires, it can redetermine its standard of need and level of benefits, subject, of course, constitutional statutory, and regulatory provisions. Rosado, supra; see also Dandridge v. Williams, 397 U.S. 471 (1970) and Jefferson v. Hackney, 409 U.S. 899 (1972). But until and unless it does so, the state is prohibited from denying mothers and children receive.

The State has demonstrated that it knows what flat grant standards to apply to provide benefits to eligible unborn children and mothers. Under the terms of the temporary restraining order, the State was enjoined, pending a hearing on the preliminary injunction, from refusing to provide benefits to the named plaintiffs, otherwise eligible mothers and their unborn children, on the grounds that the child was not yet born. The State did not claim at that time that the order was not "specific" and that it did not know what amount of benefits to pay plaintiffs. Rather the State correctly paid the named plaintiffs Anna Tirado and Jane Croe and their unborn children an amount equal to the flat grant standard for an assistance unit of two. Named Plaintiff Barbara Wisdom, who had previously received AFDC benefits for herself and her two born

children, received the proper payment for an assistance unit of four, reflecting the addition of her unborn child. The State cannot now claim that the final order does not give it "explicit notice of precisely what conduct is outlawed." Schmidt v. Lessard, ____U.S.____, 38 L.Ed. 2d 661, 665, (1974).

CONCLUSION

For all of the foregoing reasons, because the term "dependent child" as used in &406(a) of the Social Security Act includes an unborn child thereby entitling unborn children and their mothers to AFDC benefits, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATION

This is to certify that on April 24, 1974, a copy of Plaintiffs-Appellees' Brief and Supplement was mailed postage prepaid to Defendants-Appellants' Counsel:

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74-1402

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1402

WISDOM, ET AL	:	Appeal from the
	:	United States District
PLAINTIFFS-APPELLEES	:	Court for the District
	:	of Connecticut
vs.	:	
	:	
NORTON, ET AL	:	Honorable
	:	Robert F. Zampano,
DEFENDANTS-APPELLANTS	:	District Judge

SUPPLEMENT TO BRIEF FOR PLAINTIFFS-APPELLEES

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 73-1595

Linda Alcala, Individually and on behalf of all other persons similarly situated,

Appellee,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Jane Doe and Joan Roe,

Appellees,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

SUPPLEMENT 1

Submitted: January 15, 1974

Filed: March 29, 1974

Before MATTHES, Senior Circuit Judge, HEANEY, Circuit Judge, and TALBOT SMITH, Senior District Judge.*

MATTHES, Senior Circuit Judge.

This appeal presents the question, much litigated in the district courts recently, whether an unborn child is a "dependent child" within the meaning of § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), thus entitling the expectant mother to receive Aid to Families with Dependent Children (AFDC).

Defendants-appellants, Kevin J. Burns, Acting Commissioner of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, acting pursuant to their interpretation of the Employees Manual of the Iowa Department of Social Services, denied such assistance to plaintiffs-appellees, who at the time of application were pregnant and who admittedly would become eligible for benefits once their children were born. Upon denial of benefits, plaintiffs brought this class action in the United States District Court for the Southern District of Iowa charging that defendants' actions violated the Equal Protection and Due Process Clauses of the United States Constitution, and, because inconsistent with § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), also violated the Supremacy Clause. Plaintiffs sought declaratory and injunctive relief, and monetary damages for assistance wrongfully withheld.

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* Hon. Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

Following a hearing, the district court filed findings of fact and conclusions of law. Alcala v. Burns, 362 F.Supp. 180 (S.D. Iowa 1973). Formal judgment was entered adjudging invalid defendants' denial of AFDC payments to plaintiffs and permanently enjoining defendants from further denying AFDC payments to pregnant women who are otherwise qualified for such payments. Defendants have appealed.

I.

As a preliminary matter, we wish to clarify the basis for jurisdiction in the district court, although no question as to jurisdiction has been raised by the parties on appeal. See United States v. Redstone, 488 F.2d 300, 301 (8th Cir. 1973); Williams v. Rogers, 449 F.2d 513, 517 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972). As was the case in Doe v. Lukhard, ____ F.2d ____ (4th Cir., Feb. 26, 1974), to our knowledge the initial circuit case to decide the "unborn child" question, plaintiffs here alleged a colorable claim of denial of equal protection within the scope of § 1983 and its jurisdictional counterpart, § 1343(3), and, accordingly, the district court possessed pendent jurisdiction of the Supremacy Clause claim. Further, whether or not a three-judge court would have been required to determine the constitutionality of defendants' interpretation of the welfare manual, see Doe v. Lukhard, supra at n.4, a three-judge court is clearly not required to determine whether that interpretation conflicts with the Social Security Act. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

II.

The Social Security Act requires that "aid to families with dependent children * * * be furnished * * * to all eligible individuals * * *." 42 U.S.C. § 602(a)(10).

A triad of Supreme Court cases "establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." Townsend v. Swank, 404 U.S. 282, 286 (1971). See King v. Smith, 392 U.S. 309 (1968); Carleson v. Remillard, 406 U.S. 598 (1972).

If the King, Townsend and Remillard cases are to govern, it must first be determined that unborn children are "eligible," that is, that they are "dependent children" within the protection of the Act. On this point the courts have differed. Three district courts have ruled that an unborn child is not a "dependent child." Mixon v. Keller, No. 74-111-Civ-J-T (M.D. Fla., March 1, 1974); Murrow v. Clifford, Civ. No. 114-73 (D.N.J., June 12, 1973); Parks v. Harden, 354 F.Supp. 620 (N.D. Ga. 1973) (appeal pending Fifth Circuit). One circuit court and twelve district courts, including the court below, have decided that an unborn child is a "dependent child." Doe v. Lukhard, supra, aff'g 363 F.Supp. 823 (E.D. Va. 1973); Wisdom v. Norton, Civ. No. 15906 (D. Conn., Jan. 3, 1974); Stuart v. Canary, No. C 72-452 (N.D. Ohio, Dec. 27, 1973); Whitfield v. Minter, 368 F.Supp. 798 (D. Mass. 1973); Carver v. Hooker, Civ. No. 73-87 (D. N.H., Nov. 30, 1973); Tapia v. Vowell, Civ. No. 73-B-169 (S.D. Texas, Nov. 14, 1973) (preliminary injunction granted pending decision of Parks v. Harden by the Fifth Circuit); Tillman v. Endsley, No. 73-1476-Civ-CF (S.D. Fla., Oct. 1, 1973); Jones v. Graham, Civ. No. 73-L-235 (D.Neb., Sept. 5, 1973); Green v. Stanton, 364 F.Supp. 123 (N.D. Ind. 1973); Harris v. Mississippi State Dept. of Public Welfare, 363 F.Supp. 1293 (N.D. Miss. 1973);

Alcala v. Burns, supra; Wilson v. Weaver, 358 F.Supp. 1147 (N.D. Ill. 1972). Courts on both sides of the question have looked to the plain meaning of the word "child" and reached opposite results. The Act itself and the legislative hsitory are unhelpful. Of some note are the Department of Health, Education and Welfare (HEW) regulations implementing the Act which provide: "Federal financial participation is available in: * * * (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis * * *." 45 C.F.R. § 233.90(c)(2). The regulations further provide: "Federal financial participation * * * is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of * * * pregnancy of a mother." 45 C.F.R. § 233.90(c)(3). HEW, however, takes the position that these regulations merely extend an option to the state of including unborn children within its plan and do not mandate such coverage. In fact, as of 1971, 18 states and the District of Columbia furnished AFDC benefits to unborn children, while 34 states and Puerto Rico did not. Brief for HEW as Amicus Curiae, Appendix B, Murrow v. Clifford, supra.

We seriously question the right of HEW, as opposed to the unquestioned right of Congress, to decide what benefits are optional. Clearly Congress possesses, and has exercised in the past, the power to give individual states an option to exclude children eligible under the federal standards. See Townsend v. Swank, supra at 287-89 and n.5. But there is no indication that Congress has so acted with respect to unborn children.

We ask, as did the district court, from whence can HEW have derived the authority to bestow benefits, albeit supposedly optional benefits, upon unborn children if not from the eligibility provisions of the Social Security Act? We are inclined, in this respect, to accord substantial weight to HEW's understanding, implicit in the regulations, that unborn children are eligible. On the other hand, we are not permitted to defer to the agency's practice of making benefits to eligible persons optional. Townsend v. Swank, supra at 286.

We believe that the district court correctly concluded that the term "dependent child" is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act. The King, Townsend and Remillard cases, then, determine that defendants' interpretation of the welfare manual, denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid.

III.

Although granting declaratory and injunctive relief, the district court refused to order retroactive payment of benefits, citing our case of Doe v. Gillman, 479 F.2d 646, 649 (8th Cir. 1973), petition for cert. filed sub nom. Burns v. Doe, 42 U.S.L.W. 3205 (U.S. Nov. 5, 1973) (No. 73-406), which avoided deciding whether the Eleventh Amendment prohibits retroactive payments by presuming that the Iowa welfare officials would follow their own regulations which, in the court's view, provided for retroactive payments. Now appellants request this court to decide directly the Eleventh Amendment question. We have already done so in Anderson v. Graham, ____ F.2d ____ (8th Cir., Dec. 20, 1973), holding that

"the Eleventh Amendment deprives the federal court of jurisdiction to award a money judgment against the State for * * * retroactive [AFDC] payments * * *."

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2179

Jane Doe, on her own behalf, and on behalf of her unborn child and on behalf of all others similarly situated,

Appellee,

v.

William L. Lukhard, Director of the Department of Welfare and Institutions,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued December 5, 1973 Decided: February 26, 1974

Before WINTER, CRAVEN and BUTZNER, Circuit Judges.

Stuart H. Dunn, Assistant Attorney General of Virginia (Andrew P. Miller, Attorney General of Virginia, Karen C. Kincannon, Assistant Attorney General of Virginia, on brief) for Appellant; John M. Levy (Louis A. Sherman, Neighborhood Legal Aid Society, Inc., on brief) for Appellee; Nicholas A. Spinella (Joseph V. Gartlan, Jr., Spinella, Spinella & Owings, on brief) for Amicus Curiae Most Reverend Walter F. Sullivan, Apostolic Administrator of the Catholic Diocese of Richmond, Virginia.

SUPPLEMENT 2

WINTER, Circuit Judge:

In a class action, plaintiff, an unwed, expectant mother, instituted suit, on behalf of herself and her unborn child and on behalf of all other expectant mothers and their unborn children, against Virginia state and local welfare administrators. The basic objective of the suit was to obtain for unborn children the benefits under the Aid to Families with Dependent Children (AFDC) program, established under the Social Security Act, 42 U.S.C. §§ 601 et seq., to which they would be entitled had they been born. Benefits to unborn children are authorized, but not required, by federal regulation, 45 C.F.R. § 233.90(c)(2)(ii). The regulation gives states participating in the aid program the option to extend benefits for unborn children, and Virginia has declined the option. Bulletin No. 281, June 13, 1956, Virginia State Board of Welfare and Institutions.[1]

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1. Prior to May 8, 1956, Virginia's State Board of Welfare and Institutions permitted unborn children to be considered in granting benefits under the Aid to Dependent Children program (the predecessor of AFDC). The record does not establish, however, how long the previous policy had existed.

It was alleged that the suit was brought under 42 U.S.C. § 1983, with jurisdiction vested in the district court under 28 U.S.C. § 1343(3) and (4). Specifically, plaintiff claimed that (a) she and the members of the class she represented were denied equal protection of the laws because the Virginia policy denied AFDC to unborn children and their mothers but granted it to all other children and their mothers, and (b) the Virginia policy was contrary to the Social Security Act, and regulations thereunder, and was therefore invalid under the supremacy clause of the Constitution of the United States.

The district court, sitting as a single-judge court, held that it had jurisdiction of the action and that, as a matter of statutory interpretation, plaintiff was entitled to relief, because the Virginia "policy" was in conflict with the Act, as interpreted by the Secretary of HEW and, under the supremacy clause, the Act prevailed. We agree that the district court had jurisdiction. We think that the district court had jurisdiction to proceed as a single-judge court to decide the case on a nonconstitutional ground, and we agree with the district court's disposition of the case on the merits. We therefore affirm.

I.

The appeal presents two questions of jurisdiction: did the district court have jurisdiction of the subject matter, and did the district court, sitting as a single-judge court, have jurisdiction to decide the case on the merits, on non-constitutional grounds, without there being convened a three-judge court as provided in 28 U.S.C. §§ 2281 et seq?[2]

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2. The latter question is one raised by us on appeal; it was not raised by the parties. Although plaintiff sought a declaration that the Virginia policy was invalid and in violation of the equal protection clause and an injunction against enforcement of the policy for that reason, she did not suggest that a three-judge court was required. We required the parties to file supplemental briefs on the question after oral argument. In those briefs, plaintiff and the amicus contend that the district judge proceeded properly; defendant concludes that the judgment should be vacated and the case remanded to a three-judge court for decision.

The district court placed its holding that it had subject matter jurisdiction upon the dual grounds that (a) plaintiff had alleged a colorable claim of denial of equal protection within the scope of 42 U.S.C. § 1983, the court had jurisdiction to decide the claim under 28 U.S.C. § 1343(3), and the court therefore had jurisdiction to pass upon the statutory claim under the doctrine of pendent jurisdiction and (b) plaintiff's statutory claim alleged that Virginia's policy deprived her, under color of state law, of a right secured by a federal law -- the Social Security Act -- in violation of § 1983, and that such a claim was within the jurisdictional grant of 28 U.S.C. § 1343(3). Woolfolk v. Brown, 456 F.2d 652 (4 Cir. 1972) was cited as support for the conclusion that rights and benefits created by the Social Security Act were within the ambit of protection afforded by 42 U.S.C. § 1983.

We agree that plaintiff alleged a colorable claim of denial of equal protection, even though it may be doubted that ultimately this theory would prove to be meritorious. See Dandridge v. Williams, 397 U.S. 471 (1970); Roe v. Wade,

410 U.S. 113 (1973).[3] With the colorable claim under 42 U.S.C. § 1983 present, the district court unquestionably had subject matter jurisdiction to decide the claim of statutory pre-emption under its pendent jurisdiction.

We do not decide whether the incompatibility of a state law with the Social Security Act is a violation of 42 U.S.C. § 1983, or, even if it is, whether the district court had subject matter jurisdiction over a claim of such a violation under 28 U.S.C. § 1343(3) or (4). Those are questions which presumably will be answered when the Supreme Court decides Hagans v. Wyman, 471 F.2d 347 (2 Cir. 1973), a case for which certiorari was granted in ____U.S.____, 37 L.Ed.2d 396 (June 11, 1973). The district court's holding that a violation of the Act would constitute a violation of 42 U.S.C. § 1983 raises the

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3. Roe suggests that the status of a foetus as a person for purposes of the equal protection clause may be sufficiently different from a child who is born so that the "rational basis" test of Dandridge may permit different treatment.

troublesome question of whether a grant-in-aid program, in which a state is not obliged to participate, "secures" a right, privilege or immunity within the meaning of § 1983. See Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Col.L.R. 1404, 1420-21 (1972). The district court's further holding that it had jurisdiction of any violation of § 1983 under 28 U.S.C. § 1343(3) or (4), raises another equally troublesome question of whether the reach of § 1983 protection and § 1343(3) and (4) jurisdiction are coterminous since § 1983 purportedly creates liability for the deprivation of rights secured by federal "laws," but § 1343(3) grants jurisdiction to redress only rights secured by "any Act of Congress providing for equal rights of citizens . . ." and § 1343(4) grants jurisdiction to redress rights "under any Act of Congress providing for the protection of civil rights, including the right to vote." (emphasis added). See Lynch v. Household Finance Corp., 405 U.S. 538, 543-44 n.7 (1972). However, despite the district court's contrary conclusion, we do not think that either question was decided sub silentio by us in Woolfolk v. Brown, supra.

The principal jurisdictional question, as we see it, is whether the district court, sitting as a single-judge court, was authorized to decide the case, on non-constitutional grounds,

without there first being convened a three-judge court.[4] The statute, 28 U.S.C. §§ 2281 and 2284, directs that, in an action to restrain enforcement of a state statute on the ground of unconstitutionality, "[t]he district judge to whom . . . the application is presented . . . shall immediately

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4. Plaintiff seeks to avoid the issue by arguing that what is attacked on constitutional grounds is a mere "policy" of Virginia, statewide in application, not to afford AFDC benefits with respect to unborn children. Wilson v. Weaver, 358 F.S. 1147, 1150 (N.D. Ill. 1973)(alternate holding) is cited in support. Although only a written statement of policy of Virginia's State Board of Welfare and Institutions, we think the statement indistinguishable from a "regulation," and since the policy is statewide in effect, an adjudication of its facial invalidity on constitutional grounds, coupled with injunctive relief, would require a three-judge court. Bd. of Regents v. New Left Education Project, 404 U.S. 541 (1972). See also Ex Parte Bransford, 310 U.S. 354, 361 (1940).

notify the chief judge of the circuit," who shall designate a three-judge court "to hear and determine the action . . ." (emphasis added). § 2284(1). Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73 (1960) holds that a three-judge court is required when an injunction may be granted on grounds of federal unconstitutionality even though there is also a statutory non-constitutional ground for relief, and that the three-judge court has jurisdiction over all grounds of attack on the state statute. Florida Growers, 362 U.S. at 76-77, 84. Compare Swift & Co. v. Wickham, 382 U.S. 111 (1965). It may therefore be properly argued that, in such a case, not only is a three-judge court required to be convened, but also that the three-judge court must decide all issues presented in the litigation.

However, once convened in a proper case, a three-judge court has an obligation to decide a case on non-constitutional grounds where they are dispositive of the litigation and to avoid the constitutional issue which provided the justification for convening the special court. King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Wyman v. Rothstein, 398 U.S. 275 (1970). See also Carleson v. Remillard, 406 U.S. 598 (1972); and Townsend v. Swank, 404 U.S. 282 (1971).

But where the constitutional claim which served as the basis for convening the three-judge court has become moot or is decided in favor of the constitutional validity of the statute, the three-judge court may properly remand the non-constitutional questions to a single judge for final determination. Rosado v. Wyman, 397 U.S. at 403.

Admittedly, the Supreme Court has never passed on the validity of the procedure followed in the instant case -- the converse of that approved in Rosado. Here, the single judge decided and finally disposed of the case on non-constitutional grounds, pausing only to determine that the constitutional claim had sufficient substance to give the district court subject matter jurisdiction over the pendent statutory claim. Finding the constitutional claim at least colorable, he did not ask that a three-judge court be convened, and thus there was no three-judge court in existence to authorize him to decide the non-constitutional question as a single judge.[5]

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5. We infer from the record that the district judge proceeded alone through mere inadvertence. The complaint did not ask that a three-judge court be convened; and the surprise of counsel, when we raised the question during argument on appeal, would indicate that little or no consideration had been given to the question.

We do not think that the procedure followed by the district judge provides any basis on which to disturb plaintiff's judgment. Especially is this so because, as we discuss later, we think that he correctly decided the case on its merits.

As pointed out in Rosado, the fact that a complaint alleges a claim of unconstitutionality, which Congress has determined should be heard in the first instance by a district court composed of three judges, does not mean that the district court, as a single-judge tribunal, lacks jurisdiction over the case:

> Jurisdiction over federal claims, constitutional or otherwise, is vested, exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals. While Congress has determined that certain classes of cases shall be heard in the first instance by a district court composed of three judges, that does not mean that the court qua court loses all jurisdiction over the complaint that is initially lodged with it. To the contrary, once petitioners filed their complaint alleging the unconstitutionality of § 131-a, the District Court, sitting as a one-man tribunal, was properly seised of jurisdiction over the case under §§ 1343(3) and (4) of Title 28 and could dispose of even the constitutional question either by dismissing the complaint for want of a substantial federal question . . . or by granting requested injunctive relief if "prior decisions [made] frivolous any claim that [the] state statute on its face [was] not unconstitutional." Bailey v. Patterson, 369 US 31, 33, 7 L Ed 2d 512, 514, 82 S Ct 549 (1962).

397 U.S. at 402-03.

Rosado thus rejected the proposition that 28 U.S.C. § 2281 deprives a single district judge of subject matter jurisdiction over a constitutional claim for injunctive relief against the enforcement of a state statute. See 397 U.S. at 402 n.2. Section 2281 only limits a single district judge's remedial power in such a case. He may not grant injunctive relief against the enforcement of a statute, upon his own determination of the merits of the constitutional claim, in the ordinary case, but he may do so if the claim that the statute is valid is frivolous. Bailey v. Patterson, 369 U.S. 31 (1962). Certainly he has subject matter jurisdiction over the constitutional claim for the purpose of establishing his subject matter jurisdiction over a pendent claim. Where, as here, the single district judge's power to grant relief on the pendent claim is unaffected by § 2281, we perceive no barrier to his adjudicating it; he had both subject matter jurisdiction and remedial power over it.

The only remaining question is whether the converse of the procedure approved in Rosado is improper from the standpoint of maximum efficiency in the operation of the federal judicial system.

Although the procedure followed in the instant case does minimize the burden of three-judge courts on the judges of the lower federal courts in most cases, it may bring about an additional burden on the Justices of the Supreme Court, and it may cause lower federal judges to decide constitutional questions unnecessarily. For these reasons, we disapprove it. A three-judge court, properly convened, is obliged to decide the case before it on non-constitutional grounds if they are dispositive of the litigation. Minds may well differ on the merits of non-constitutional, as well as constitutional contentions. If a single judge undertakes to decide the non-constitutional questions before a three-judge court is convened and it later develops that the three-judge court must be convened, that court would be restricted from carrying out its obligation to decide the case on non-constitutional grounds. While in most cases the restriction would be of little moment, if the two judges designated to sit with the originating judge doubted the correctness of his decision of non-constitutional questions, they would be powerless to correct his incorrect result. They lack authority to act as a truncated court of appeals and reverse him. Their only course would be to decide a constitutional question that they saw no need to reach.

The only tribunal which could correct his error, as of right, is the Supreme Court which must entertain an appeal when the constitutional question is decided and injunctive relief is granted or denied. 28 U.S.C. § 1253.[6] Thus, the course followed by the district court in the instant case, in other circumstances, could well generate unnecessary appeals to the Supreme Court, as well as require unnecessary decisions by lower federal judges.

Given the obligation of a three-judge court to decide a case on non-constitutional grounds if they are dispositive and its right to remand non-constitutional grounds to a single judge for decision, we think the better practice is for the three-judge court to be designated and for it to decide whether to remand non-constitutional questions to a single judge or to

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6. Conceivably, the single-judge's decision of a non-constitutional question could be certified for an interlocutory appeal under 28 U.S.C. § 1292(b) before he requests that a three-judge court be convened, but certification is a discretionary act on the part of the district judge, even within the class of cases eligible for certification, and granting the right to appeal is discretionary with the Court of Appeals.

address them as a three-judge court. While this procedure may not solve all of the problems posed, as, for example, where a three-judge court remands non-constitutional questions to a single judge and the non-participating judges are in disagreement with his decision, it will go far in holding them to a minimum. Certainly the three-judge court will be in a better position to weigh the disadvantages of potential increased caseload for the Supreme Court and potential need for unnecessary decision by the three-judge court of constitutional issues resulting from the possibility of a decision of a non-constitutional issue not in accord with the views of a majority of the three-judge court against the increased efficiency of initially remanding non-constitutional questions to a single judge, rather than to leave the resolution of these conflicting considerations to chance.

II.

On its merits, we think that the district court correctly decided the instant case. It held that Virginia's policy of excluding unborn children in the AFDC program was in conflict with the Act, as interpreted by the Secretary, impliedly holding that that portion of HEW's interpretation which purportedly gave Virginia the option to decide that an unborn child may or may

not be a beneficiary under the program invalid. We approve the reasons advanced for the holding. We note that since the district court decided the instant case, the question presented has received like resolution in Carver v. Hooker, C/A 73-87, D.N.H. (November 30, 1973); Whitfield v. Minter, C/A 73-3051-F, D. Mass. (December 26, 1973); Stuart v. Canary, C/A 72-452, N.D. Ohio (December 27, 1973); Wisdom v. Norton, C/A 15906, D. Conn. (January 3, 1974).

A F F I R M E D.

§402(a) of the Social Security Act, 42 U.S.C. §606(a)

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

Connecticut General Statutes

§ 52-435a. Petition by mother. Continuance of case. Evidence

Proceedings to establish paternity of a child born or conceived out of lawful wedlock, including one born to, or conceived by, a married woman but begotten by a man other than her husband, shall be instituted by a verified petition of the mother or expectant mother, with summons and order, filed in the circuit court for the circuit in which either she or the putative father resides. Upon the filing of such petition, such court or any judge assigned to said court shall cause a summons, signed by him or by the clerk or assistant clerk of said court, to be issued, requiring the putative father to appear in court at a time and place named therein to show cause, if any he has, why the prayer of said petition should not be granted. Such petition, summons and order shall be in a form approved by the judges of the circuit court. In the case of a child or expectant mother being supported wholly or in part by the state, service of such petition may be made by any investigator employed by the state welfare department. No such petition shall be brought after three years from the birth of such child, or after three years from cessation of contribution toward support of the child by the putative father, whichever is later; provided the provisions of section 52-590 shall be applicable to this section. If such putative father fails to appear in court at such time and place, the court may hear the petitioner and enter such judgment and order as the facts may warrant. Such court may order continuance of such hearing; and if such mother or expectant mother continues constant in her accusation, it shall be evidence that the respondent is the father of such child.

(1965, P.A. 406, § 1, eff. July 1, 1965; 1967, P.A. 520, § 1.)

§ 52-438a. Procedure in action brought by expectant mother

In the case of any such petition brought prior to the birth of the child, no final trial on the issue of paternity shall be had, except as to hearing on probable cause until after the birth of the child. In such hearing on probable cause the court, on the day on which the defendant has been summoned to appear, shall determine whether probable cause exists, and if so, the court shall order the defendant to become bound to the complainant, with surety to appear on a date certain for final determination, or further continuance as circumstances may then require.

(1967, P.A. 520, § 2.)

Library references

Bastards ⇐19, 55.

C.J.S. Bastards §§ 32, 116 et seq.

SECTION 216(h)(3)(A)(ii) (42 U.S.C. 416(h)(3)(A)(ii))—RELATIONSHIP—STATUS OF CHILD CLAIMANT CONCEIVED PRIOR TO WORKER'S ENTITLEMENT TO RETIREMENT INSURANCE BENEFITS BUT BORN THEREAFTER

20 CFR 404.1101(d)(1)(ii) and 20 CFR 404.1113 SSR 73-19

Where a child claimant had been conceived but not born at the time of his biological father's entitlement to retirement insurance benefits, *held*, such child was sufficiently "in being" at time of worker's entitlement to retirement benefits to be capable of living with worker at that time for purposes of section 216(h)(3)(A)(ii) of Social Security Act, as amended, by virtue of fact that child's mother was living with the worker at such time.

R, a fully insured worker, became entitled to retirement insurance benefits effective February 1972. At that time he was both living with and contributing to the support of a woman who was pregnant with the child claimant. The child was born out of wedlock in May 1972 and the worker's paternity has been established by satisfactory evidence.

The issue to be resolved is whether the child claimant, who had been conceived but not born at the time the worker became entitled to retirement insurance benefits, was sufficiently "in being" to be living with the worker within the meaning of section 216(h)(3)(A)(ii) of the Social Security Act, as amended, by virtue of the fact that the worker was living with the mother of the child at the requisite time.

Section 216(h) of the Act provides in pertinent part that:

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2), shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

* * * * * * * *

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occured; . . . .

While there appears to be neither administrative rulings nor case law which interprets the "living with" provision of section 216(h)(3)(A)(ii) of the Act as applicable to the present factual situation, the Social Security Administration has, in analogous cases, interpreted a similar provision of the Act.

For example, section 216(h)(3)(C)(ii) of the Act reads, in pertinent part:

> (3) . . .
> (C) in the case of a deceased individual
>
> * * * * * * *
>
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

The language of the above quoted sections are similar. In 1968 the Administration in considering the latter provision, ruled that where a child was born 3 months after the worker's death and the child's mother was living with or receiving substantial contributions from the worker at his death, the child was considered "in being" and met the living with or contribution requirement of section 216(h)(3)(C)(ii) at the worker's death. Social Security Ruling 68–22, Cumulative Bulletin 1968, page 66.

To the same effect: a ruling was made in 1967 concerning an after born child. There a child who was legally adopted by a disability insurance beneficiary in March 1964, was conceived before the beginning of the beneficiary's period of disability in February 1961 but born thereafter in June 1961. The child's mother, the beneficiary's stepdaughter, was residing in his household at the beginning of his period of disability. Pursuant to an application for child's insurance benefits filed in February 1966, it was determined that such child may be considered sufficiently "in being" at the beginning of the period of disability so as to be capable of "living with" the beneficiary at that time. SSR 67–17, Cumulative Bulletin 1967, p. 16.

Accordingly, it is *held* that R's child may be considered "in being" and living with the worker at the time the latter became entitled to retirement insurance benefits.

May 10, 1941

TRANSMITTAL SHEET FOR BOARD ACTION

TO: Oscar M. Powell
Executive Director

FROM: June M. Hoey, Director
Bureau of Public Assistance

SUBJECT: Extension of Aid to Dependent Children in Behalf of Unborn Children.

Action Recommended

It is recommended that the Board find that Federal participation may be extended on behalf of unborn children to those States which include provision for unborn children within the scope of the aid to dependent children program.

Major Reasons for the Recommendation

Aid to dependent children as a program designed to meet the needs of children deprived of parental support or care should be properly available to meet such needs in any of the circumstances in which they arise, including the child's prenatal existence. Developments in medical science and legal interpretation lend support to the validity of recognizing and meeting the needs of children during their prenatal existence in order to assure their sound and healthful development.

Anticipated Effect of the Proposed Action

During the operation of the aid to dependent children program, the question of whether Federal matching may be available to States that include in their plans provision for unborn children has arisen in a few States only. It is, therefore, anticipated that the action which is recommended would not result in any general extension of the aid to dependent children programs on the part of the majority of State agencies administering aid to dependent children, it is, in fact, likely that one State only, namely, Wisconsin, would immediately avail itself of the broadened scope permitted under this interpretations.

May 10, 1941

TO: Executive Director

FROM: Jane M. Hoey, Director
Bureau of Public Assistance

SUBJECT: Extension of Aid to Dependent Children in Behalf of Unborn Children.

FOR CONSIDERATION BY THE BOARD

The question whether Federal matching may be granted to States that include in their plans for aid to dependent children, provision for unborn children, has arisen at various times. Wisconsin, which has since 1931 made a specific provision for assistance "to the mother of a child during the period extending from six months before to six months after the birth of the child," has raised the question of Federal participation in payments on behalf of unborn children under the State plan for aid to dependent children. Michigan raised a similar question in January, 1939. A related question has also been presented to the Bureau in connection with an interpretation of residence. With respect to aid for a dependent child born while the mother is temporarily out of the State, the State of Nebraska submitted an Attorney General's opinion dated March 2, 1939, which indicated that "it would be entirely within the law to allow the child credit for residence during the period of gestation."

Policy Considerations

The Bureau of Public Assistance, after consultation with the Office of the General Counsel, wishes to recommend that the Board base its answer to these and related questions upon the following considerations:

1. Aid to dependent children, as a program designed to meet the needs of children deprived of parental support or care under conditions specified in Federal and State legislation should properly be available to meet such needs in any of the circumstances in which they arise.

2. It has been generally recognized, abroad and in this country, that the State has an interest in the health and well-being of its children, and that it should provide assistance to insure their sound and healthful development. Since the circumstances of the prenatal period affect the child's development, the State is rightly concerned in providing for the needs that are created by the child's existence during the prenatal period.

3. The needs created by the child's existance must be supplied through the mother, during the prenatal period. The needs of the child are met only as the mother's needs, economic, social, and medical, are adequately cared for throughout the period of pregnancy.

4. There is fairly uniform legal authority which states that a child may be regarded as a person in being, during its prenatal existence, whenever such recognition is necessary for the child's own benefit. The courts have acknowledge the importance of adequate prenatal care and the consequent authority to enforce support in the interest of an unborn child.

5. Medical advice indicates that the diagnosis of pregnancy may be established with reasonable accuracy within one month after conception; undue difficulties in establishing the fact of the child's existence would not, therfore, arise in most instances.

Title V has provided for extension of existing facilities of State and local programs for maternal and child care. These are generally limited, however, to educational programs and, in some instances, to the provision of medical services. Furthermore, at the present time the benefits of Title V providing for maternal and child health services are not available in the majority of local communities.

It is recognized that in an extension of the aid to dependent children program, to provide for unborn children, State plans should include standards and procedures for determining eligibility on essentially the same basis as in other cases. An extension of the aid to dependent children program to include provision for unborn children would enable the State to give recognition to the needs of the child beyond those which would otherwise be planned for in relation to the mother as the responsible relative.

Recommendation

In the light of the above considerations, the Bureau of Public Assistance recommends that the Board find that Federal participation may be extended on behalf of unborn children to those States which include provisions for unborn children within the scope of the aid to dependent children program.

Jane M. Hoey

Cleared by the Office of
the General Counsel

COPY

July 23, 1941

OFFICE OF THE BOARD

TO: Miss Hoey
Mr. Falk
Mr. Stern
Mr. Tate
Mr. Wilbert
Miss Engle
Miss Beaman
Miss Wasserman
Mr. Corson

FROM: Maurine Mulliner

At the meeting of the Board on July 15, 1941, the following action occurred:

"Pursuant to the Board action of May 20, 1941, page 10065, paragraph 3, the Board considered further the memorandum from Miss Hoey dated May 10, 1941, 'Extension of Aid to Dependent Children in Behalf of Unborn Children' (Document No. 177-b). No formal policy was enunciated at this time, but the Board directed that the audit exception taken in Wisconsin to assistance payments made under the Aid to Dependent Children program in behalf of unborn children should be waived, and it was understood exceptions would not be taken to such payments in the future. It was agreed efforts would be made by the Children's Bureau as well as the Bureau of Public Assistance regional staffs to interest the State agencies in expanding their maternal and child health services."

This is to supersede my memorandum of July 18, 1941, covering the same subject. A change has been made in the last line of the quoted paragraph. Please return the superseded memorandum in order to clear the record.

Maurine Mulliner

3410. Deprivation of Parental Support or Care

3411. Provision of the Act

Title IV, section 406 (a) reads:

> "The term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ."

3412. Interpretation

This provision sets forth the two eligibility factors, "need" and "deprivation of parental support or care," on which Federal participation is conditioned. The provision requires that both need and deprivation of parental support or care exist in the individual case but does not require that an affirmative showing be made that a causal relationship exists in the individual case.

Under the act, the term "deprived of parental support or care" is interpreted to encompass the situation of any child who is in need and otherwise eligible, and whose parent either has died, has a physical or mental incapacity, or is prevented by continued absence from providing maintenance, physical care, and guidance for his children. In this interpretation "parent" may mean either the father or the mother. Since the interpretation relates to parental support or care, it is equally applicable whether the parent was the chief breadwinner or devoted himself or herself primarily to the care of the child.

Situations within the scope of the term "deprivation" are as follows:

1. Children Living With Both Natural Parents

   Children may be included when living with their natural mother and father, if they are deprived of parental support or care by reason of the incapacity of either parent.

2. Children Living With Either Father or Mother

   Children may be included when deprived of support or care by reason of the death, incapacity, or continued absence of either the mother or father.

Deprivation of Parental Support or Care (continued)

3. Legally Adopted Children

Legally adopted children are included on the basis of deprivation of parental support or care due to the death, continued absence, or incapacity of one or both of the parents who adopted the child, rather than on the basis of deprivation of the natural parent's support or care. This interpretation recognizes the current development of social legislation designed to effect complete substitution for the natural parents, in the relationship sustained by a child and the parents who adopt him.

4. Children Living in Home of Stepparents

A child living in the home of a stepparent who is not required by State law to assume a parental role, may be included on the ground that he lacks the support or care of the natural parent who is dead or absent. In the absence of legal obligation to assume a parental role, a stepparent is no more of a "parent" than any other person acting in loco parentis. In these situations, the only safeguard to the child's right to assistance is his eligibility under the condition of being deprived of the support or care of the natural parent. In States in which the stepparent is required to assume a parental role, a child may be deprived of support or care if the stepparent is dead, absent, or incapacitated.

5. Children of Unmarried Parents

Children of unmarried parents may be included within the scope of title IV on the same basis as children of married parents. The act provides for the use of aid to dependent children as a maintenance resource available on equal terms to all children who meet eligibility conditions.

6. Unborn Children

When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to other children.

3414. Federal Financial Participation

For each individual for whose assistance payments Federal participation is claimed, deprivation of support or care must have been determined in accordance with the requirements for the approval of State plans except that when the State definition is less liberal than the Federal interpretation, Federal participation may be claimed on the basis of the latter.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Welfare Administration
Bureau of Family Services

February 4, 1965

POLICY INFORMATION RELEASE NO. 37

In reply refer to:
15:D

TO ALL BUREAU STAFF FOR INFORMATION ONLY

SUBJECT: Inclusion of Unborn Child in AFDC Payments (List under Eligibility, Determination of and Aid to Families of Dependent Children; File under IA 4)

A State plan provision providing for assistance to an unborn child only if the mother is already a recipient of AFDC for one or more other children cannot be accepted. Such a plan provision is not in compliance with the requirements of title IV of the Social Security Act.

A State may include unborn children under its approved AFDC plan and receive Federal financial participation in payments to meet their need, if such children meet the definition of "dependent child" in section 406 (a) of the Act. This is consistent with the objectives of the Act. However, the conditions under which coverage of the program is extended to unborn children must be established on the basis of principles that assure equitable and uniform treatment of all individuals in like circumstances of need in order for the State to continue to qualify for Federal grants for its AFDC program. To include only the unborn child whose mother is already receiving AFDC does not meet these principles. The question arises from the fact that coverage is extended only to the unborn child of a mother who is a recipient because she has at least one other child who qualifies for AFDC. It excludes the unborn child of a pregnant woman who does not have a sibling eligible for AFDC but is in similar circumstances as to need and parental deprivation.

Such a State plan proposal discriminates arbitrarily and capriciously against such a child and, therefore constitutes a classification that is unrelated to need and is unreasonable in terms of the objectives and principles governing administration of the AFDC program.

SUPPLEMENT 8

Amendments to Social Security Act.

In 1939, the age limitations within the statutory definition of "dependent child" were extended in order to include children between the ages of 16 and 18 years who were "regularly attending school." Act of Aug. 10, 1939, Ch. 666 Title Iv §403, 53 Stat. 1380.

In 1950 the Act was amended to extend aid under Title IV to the "relative with whom any dependent child is living." Act of Aug. 28, 1950, Ch. 809, Title III, Part 2, §323(a), 64 Stat. 551

In 1956 the caretaker relative definition was expanded and the definition of "dependent child" was again extended by including all children in the 16 to 18 year age group regardless of whether such children were attending school, as previously had been required. Act of Aug. 1, 1956, Ch. 836 Title III, Part III, §§321, 322, 70 Stat. 850. Also in 1956, section 401 of the Act, 42 U.S.C. §601, was amended to include within the purposes for which appropriations were there authorized, "financial assistance and other services." Id. Title III, Part II, §312(a), 70 Stat. 848.

In 1961, coverage was provided for children in foster family homes, Act. of May 8, 1961, P.S. 87-31, §2, 75 Stat. 76, and coverage was also extended to children whose need was based upon unemployment of the father. Act of May 8, 1961, P.L. 87-31, §1, 75 Stat. 75.

In 1964 the age limits were again extended, this time to include children between the ages of 18 and 21 years who were attending high school or pursuing a high school diploma. Act of Oct. 13, 1964, P.L. 88-641, §2(a), 78 Stat. 1042.

In 1965 the age requirement was again expanded to include 18 to 21 year old high school, college, or university students, Act of July 20, 1965, P.L. 89-97, Title IV, §409, 79 Stat. 422, and Medicaid and Health Insurance benefits were made available to all Title IV recipients. Id., Title I, Part I, §102(a), Part 2, §121(a), 79 Stat. 312, 344.

In 1968, child welfare services were added to existing forms of aid, Act. of Jan. 2, 1968, P.L. 90-248, Title II, Part 3, §240(c) 81 Stat. 911-15, and a cost of living increase was imposed upon need determination figures and maximum grants for all State plans.